

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACKIE C. MOSLEY and DEPARTMENT OF THE ARMY,
AMMUNITION DEPOT, McAlester, OK

*Docket No. 99-198; Submitted on the Record;
Issued September 6, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's untimely request for reconsideration.

In a decision dated October 31, 1994, an Office hearing representative affirmed the denial of appellant's claim of recurrence. The hearing representative found that at the time of the Office's October 6, 1993 decision, the medical evidence in the case file included no statement by a physician that appellant was disabled from performing the light-duty job he held prior to stopping work on July 21, 1993, much less any medical rationale supporting such an opinion based on a complete and accurate factual and medical background.

In a letter postmarked July 19, 1995, appellant requested an oral hearing before an Office hearing representative. He argued that there was a conflict in medical opinion between the Office referral physician and his attending physician.

In a decision dated August 16, 1995, an Office hearing representative denied appellant's request for an oral hearing on the grounds that he had already received a hearing and that a second hearing would serve no useful purpose.

In a letter postmarked June 16, 1997, appellant again requested an oral hearing before an Office hearing representative based on the reports of two physicians.

In an undated letter received by the Office on May 4, 1998, appellant requested reconsideration of the Office's August 16, 1995 decision denying his previous request for an oral hearing. Appellant submitted medical reports from 1996 and 1997 stating that he was unable to work. One of the physicians stated that appellant had a work-related problem and disability that was going to be continuing and permanent in nature. Appellant advised that he had received steroid therapy for pain "that did nothing for me." He also advised that he had continuing complaints of pain.

In a decision dated August 25, 1998, the Office found that appellant's undated request was untimely. The Office denied his request on the grounds that it failed to present clear evidence of error in the Office's final merit decision.

The Board finds that the Office properly denied appellant's untimely request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may:

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued."¹

The hearing representative's August 16, 1995 decision, which denied appellant's previous request for an oral hearing, was not a decision "for or against the payment of compensation" under section 8128(a) of the Act. That decision carried no right to reconsideration and the hearing representative properly advised appellant that his review rights, with respect to that decision, were limited to review by the Board. The Office, therefore, treated appellant's undated request received on May 4, 1998 as a request for reconsideration of the Office's most recent merit decision, which in this case was the hearing representative's October 31, 1994 decision affirming the denial of appellant's claim of recurrence.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation 20 C.F.R. § 10.138(b)(2) provides that the Office will not review a decision denying or terminating a benefit, unless the application for review is filed within one year of the date of that decision. Nonetheless, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application shows "clear evidence of error" on the part of the Office.²

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.³ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁴ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to

¹ 5 U.S.C. § 8128(a).

² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (May 1996).

³ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁴ See *Leona N. Travis*, 43 ECAB 227 (1991).

establish clear evidence of error.⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁶ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁷ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.⁸ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.⁹

Appellant made his undated request for reconsideration received on May 4, 1998 more than one year after the hearing representative's October 31, 1994 decision, affirming the denial of his claim of recurrence. His request is, therefore, untimely. The question for determination is whether his untimely request shows clear evidence of error in the hearing representative's decision.

The Board finds that appellant's untimely request fails to show clear evidence of error. Although appellant submitted medical evidence to support that he was unable to work, with one medical report indicating that appellant's problem and disability were work related, neither physician directly addressed the specific issue raised by the hearing representative's October 31, 1994 decision, whether appellant's claimed recurrence of disability beginning July 21, 1993 was a result of a change in the nature or extent of his injury-related condition or a change in the nature and extent of his light-duty job requirements. Neither physician provided a well-reasoned medical opinion on this issue based on a complete and accurate factual and medical background. Their reports are of little probative value¹⁰ and are insufficient to establish clear evidence of error. Further, appellant's unsuccessful therapy and continuing complaints of pain are irrelevant to the grounds upon which the Office denied his claim of recurrence.

As appellant's untimely request for reconsideration fails to show clear evidence of error in the Office's denial of his claim of recurrence, the Board finds that the Office properly denied a merit review of his claim.

⁵ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁶ See *Travis*, *supra* note 4.

⁷ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁸ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

¹⁰ *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954); see *James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete); see generally *Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

The August 25, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
September 6, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member